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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1229

JOE S. HOPPER,
Warden, Georgia State Prison,
Petitioner,

v.

LUTHER HENRY ALLEN,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-

JOE S. HOPPER, Warden,
Georgia State Prison,

Petitioner,

v.

LUTHER HENRY ALLEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The petitioner, Joe S. Hopper, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on November 26, 1975.

OPINIONS BELOW

No opinion was rendered by the Court of Appeals; the judgment of the District Court was affirmed pursuant to Fifth Circuit Local Rule No. 21. See Appendix A.

The opinions rendered by the District Court for the Middle District of Georgia are unreported; the opinions appear in Appendices C and D.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on November 26, 1975. A timely petition for rehearing was denied on January 13, 1976. See Appendix B. This petition for certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

1.

When a state habeas corpus applicant unsuccessfully asserts the denial of a federal constitutional right in the state courts, on facts that do not warrant a conclusion that the constitutional right was abridged, if, in a subsequent federal

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habeas corpus action, the applicant relies on the same constitutional right buttressed by other, materially different facts, under 28 U.S.C. § 2254(b), must the district court require the applicant to present the materially different facts to the state courts before ruling on the merit of application?

STATUTORY PROVISIONS INVOLVED

UNITED STATES CODE, TITLE 28:

§ 2254. State custody; remedies in Federal courts.

* * * * *

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

STATEMENT OF THE CASE

On March 4, 1971, the grand jury of Elbert County, Georgia, returned a two count indictment charging the respondent, Luther Henry Allen, with raping Georgia Mae Fortson. The counts of the indictment charged Allen with having raped Mrs. Fortson on two occasions, December 17, 1970, and January 20, 1971.

Allen was tried before a jury and found guilty of both charges on March 10, 1971. Sentenced to concurrent terms of life imprisonment, the judgments of conviction were affirmed on appeal to the Supreme Court of Georgia. Allen v. State, 228 Ga. 859, 188 S.E. 2d 793 (1972).

Approximately one year after the affirmance of his convictions, Allen sought habeas corpus relief in the Superior Court of Tattnall County, Georgia. As a basis for relief Allen asserted (1) that he was denied a preliminary hearing, (2) that he was convicted on the uncorroborated testimony of the rape victim, (3) that he was prosecuted by the husband of the victim,[1] and (4) that he was

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[1]The husband was the prosecuting witness.

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denied the effective assistance of counsel in Elbert County.[2]

Allen's ineffective counsel claim was premised upon the factual contention that his appointed counsel, Carlton Matthews, proceeded to trial without sufficient time in which to prepare an adequate defense (R. Vol. I 10, 53); As noted, Allen was indicted on March 4, 1971, and stood trial on March 10, 1971. The order appointing Matthews to represent Allen was signed on March 8, 1971. As was customary in rural Elbert County, however, Matthews prepared the order after having been verbally informed of the appointment. On the basis of a post-trial affidavit filed by Matthews pursuant to the Georgia Criminal Justice Act, it was apparent that Matthews probably became aware of his appointment as early as March 5, 1971. (R. Vol. I 82, R. Vol. II 40, 41).

Allen, proceeding in forma pauperis, represented himself in the state habeas case. After an evidentiary hearing in the state habeas court, Allen was remanded to custody. On appeal, the judgment of the habeas court was affirmed.

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[2]Subsequent to the affirmance of the convictions and a few months prior to the filing of the state habeas action, Allen's Elbert County attorney died. (R. Vol. I 24).

Allen v. Caldwell, 231 Ga. 442, 202 S.E. 2d 35 (1973)(two justices dissenting on the preliminary hearing issue).

Having exhausted state remedies, Allen filed an application for habeas corpus relief in the federal district court for the Middle District of Georgia. Allen, again proceeding without the assistance of counsel, presented the same grounds for relief that had been presented to the state courts. The jurisdiction of the district court was founded on 28 U.S.C. § 2241 and 28 U.S.C. § 2254. The district court appointed counsel to represent Allen. After an evidentiary hearing, the district court concluded that Allen had not been afforded effective counsel in Elbert County and ordered that Allen was either to be discharged from custody or retried.

The facts upon which the district court based its conclusion that effective counsel was lacking differed materially from the facts developed in the state courts. Developed for the first time at the federal evidentiary hearing,[3] the

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[3]On the basis of exhaustion, or rather, the lack thereof, objection was made in the district court to the consideration of materially different facts pertaining to the ineffective counsel issue.

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additional facts were: (1) counsel failed to interview the victim of the rapes and her 13 year old son prior to trial,[4] (2) black persons were significantly underrepresented on Elbert County jury rolls,[5] (3) counsel did not object to hearsay testimony concerning the arrest warrants issued in the case,[6] (4) counsel did not develop evidence concerning the victim's

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[4]After discussion with counsel, Allen agreed that the best theory of defense was consensual interccurse. (R. Vol. I 56).

[5]Allen and the victim are black; Elbert County is rural and it is reasonable to infer that the black community would have been aware, based on general reputation, of Allen's previous criminal escapades. Allen peremptorily challenged both black men from the panel from which his jury was chosen. (R. Vol. I 223).

[6]The testimony revealed that the victim did not officially complain of the rapes for over a month after the second assault. (R. Vol. I 118, 126).

numerous arrests for public drunkenness and prior, specific acts of unchasteness,[7] and (5) counsel did not object to the disclosure of Allen's criminal record to the jury.[8]

Apparently agreeing with the state courts, the district court did not find that the length of time in which counsel prepared for trial contributed to his effectiveness vel non. See, Avery v. Alabama, 308 U.S. 444 (1940).

On appeal, the Court of Appeals affirmed without opinion pursuant to Local Rule 21.[9]

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[7]Evidence as to the victim's arrests for public drunkenness would have been inadmissible under state law as being irrelevant. Prior, specific acts of sexual misconduct were similarly inadmissible.

[8]Under Georgia's bifurcated sentencing procedure, Allen's record was not disclosed until after he had been found guilty. (R. Vol. I 185-191).

[9]The primary focus of the petitioner's argument in the Court of Appeals was exhaustion: The state courts did not have the opportunity to consider the materially different facts adduced at the federal hearing "either as factual evidence relating to ineffective counsel or as separate and independent constitutional issues."

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REASONS FOR GRANTING THE WRIT

A. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF 28 U.S.C. § 2254(b).

If a state habeas applicant seeks relief from a conviction in the state courts on a given set of facts, premised upon a particular constitutional theory, he cannot thereafter, consistent with 28 U.S.C. § 2254(b), prevail in the federal courts on the same facts, buttressed by a different constitutional theory. Picard v. Conner, 404 U.S. 270 (1971). The state courts must first be presented with the substance of the federal claim. Id. at 278.

Sub judice, the district court and the Fifth Circuit were presented with the converse situation -- same constitutional theory, materially different facts.[10]

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[10] In Picard, the Court noted the converse situation but, of course, had no reason to do more than note its existence. 404 U.S. at 276.

Other circuits require exhaustion when the state habeas applicant seeks to present, or presents, factual contentions in support of a constitutional claim to the district court that differ significantly from the factual contentions presented to the state courts in support of the same constitutional claim. E.g., Gurule v. Turner, 461 F. 2d 1083, 1084 (10th Cir. 1972); Daniels v. Nelson, 453 F. 2d 340 (9th Cir. 1972); Needel v. Scafati, 412 F. 2d 761, 765-766 (1st Cir. 1969), cert. denied, 396 U.S. 861 (1969); United States ex rel. Figueroa v. McMann, 411 F. 2d 915 (2d Cir. 1969); Thompson v. Peyton, 406 F. 2d 473, 476 (4th Cir. 1968). The conflict between the Fifth Circuit and the First, Second, Fourth, Ninth, and Tenth Circuits on exhaustion -- same constitutional theory, materially different facts -- is complete and cannot be reconciled.

The Fifth Circuit has chosen, through local rules, to avoid "publicizing" the conflict; the conflict nevertheless remains. This Court should not permit a circuit court to possibly evade certiorari review by the arguably questionable use of "no-publish" local rules.

The conflicts noted justify the grant of certiorari to review the judgment below.

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B. THE PETITION PRESENTS AN IMPORTANT QUESTION OF FEDERAL-STATE COMITY THAT SHOULD BE SETTLED BY THE COURT.

In Picard v. Conner, 404 U.S. 270 (1971), the Court held:

> ". . . the substance of a federal habeas corpus claim must first be presented to the state courts." 404 U.S. at 278. (Emphasis added).

Of course, when a state habeas applicant has once presented the state courts with a full opportunity to resolve federal constitutional issues, the exhaustion requirement of 28 U.S.C. § 2254(b) is satisfied. Francisco v. Gathright, 419 U.S. 59 (1974); Roberts v. LaVallee, 389 U.S. 40 (1967); cf., Humphrey v. Cady, 405 U.S. 504, 517 n. 18 (1972).

Sub judice, however, the factual substance of the ineffective counsel claim upon which the district court granted habeas corpus relief was never presented to the state courts. The state courts have been denied the opportunity to receive and weigh the additional factual material that was developed in the district court; the state courts

have been denied the opportunity to apply controlling legal principles to the additional facts as they may find them to be -- the ineffective counsel claim before the state courts was simply not the same ineffective counsel claim before the district court and before the court of appeals.

Whether 28 U.S.C. § 2254(b) requires recourse to the state courts, in the context of the facts of this case, is a recurring and significant problem to district courts throughout the nation. The problem is equally important, if not more so, to the state courts whose decisions must pass the scrutiny of the federal district judge. The issue has not previously been squarely confronted by the Court;[11] the importance of the issue suggests that the time for review is ripe.

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[11] Cf., Pitchess v. Davis, 421 U.S. 482 (1975).

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CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-2324
Summary Calendar*

LUTHER HENRY ALLEN,
Petitioner-Appellee,

versus

JOE S. HOPPER, Warden,
Georgia State Prison,
Respondent-Appellant.

Appeal from the United States District Court for the
Middle District of Georgia

(November 26, 1975)

Before WISDOM, DYER and CLARK, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

*Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

[1]See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F. 2d 966.

Issued as Mandate:

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-2324

LUTHER HENRY ALLEN,

Petitioner-Appellee,

versus

JOE S. HOPPER, Warden,
Georgia State Prison,

Respondent-Appellant.

Appeal from the United States District Court for the Middle District of Georgia

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ON PETITION FOR REHEARING

(JANUARY 13, 1976)

Before WISDOM, DYER and CLARK, Circuit Judges.

PER CURIAM:

Our affirmance of the Final Order Granting Writ of Habeas Corpus entered April 9, 1975 does not reach the second ground stated in the district

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court's announcement of April 1, 1975, relating to cruel and unusual punishment.

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

LUTHER HENRY ALLEN,)
Petitioner,)
v.)
JOSEPH HOPPER, Warden,)
Georgia State Prison,)
Respondent.)

CIVIL NO. 74-39-Ath.

Gentlemen, the Court is reserving any actual determination on the jury composition question until the facts are before the Court.

Not long ago I went to a convocation at the University of Georgia, and attending that convocation were Justices of the Supreme Court of Georgia, Judges of the Court of Appeals of Georgia, a substantial number of Federal Trial Judges and State Trial Judges, at least one of the fifteen Judges of the Fifth Circuit Court of Appeals, and many distinguished professors from our various law schools. One of the distinguished speakers on that occasion was Judge Aldisert who is in my humble judgment a very scholarly judge of the United States Court of Appeals for the Third Circuit. According to the introduction of Judge Aldisert, before being appointed to the appellate bench, he I think for some more than ten years sat as a trial judge in the State of Pennsylvania. He has been a distinguished lecturer many,

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many places in these United States dealing with the judicial process. He suggested one thing that I think is worthy of note. He said that there are many critics within the legal profession who suggest that judges in deciding cases fail to put on the record the real reason that causes them to make the decision that they make. He says that in Switzerland - I believe it was Switzerland - some foreign country - after a case is argued in the appellate level, the judges sit and confer with each other with everybody present. They decide that case in public, then stating among themselves in argument as to why they decide it, so the world really knows why they decided it. They don't go back and shut the doors and say, "Boys, this is a case that ought to be decided; let's find out some way to do it." - which I suggest is frequently the case in our process. The judge sits in the courtroom and listens and then he goes back to Chambers and figures out what to do with the case.

I am not going to do that today. I am going to adopt Judge Aldisert's suggestion. We judges ought to really be frank and open with litigants and with the public and tell what's the human basis for making a decision, as well as the legal basis - the human basis and the legal basis in this case.

I want to suggest to you, first of all, that any human being who reads the transcript of this trial, the basis on which this man was sent to Reidsville under two life sentences, would have to say that the entire set of circumstances completely shocks the conscience. That's the way it really hit me as I read it - I could not

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believe, as a human being, that in this society that we live in where we have constitutional and legal rights, that any human being on the face of this earth would be tried in any court-room and sent off to spend the rest of his natural life as a result of what's in this record. Admittedly, in a habeas corpus proceeding, this Court cannot consider the quantum of evidence that resulted in his conviction. The cases do indicate a total absence of evidence rises to constitutional standards.

There's not a total absence of evidence in this case, but I suggest to you that the evidence that is in this case is incredible. It's just as incredible as if I were to come in here and swear under oath that unlike the astronauts who went to the moon in a vehicle that we know of, that I got on my pogo stick and went to the moon last night and came back this morning before breakfast.

In the course of human events, human beings do not get raped like this woman was raped on two occasions. That to me is just common sense and common knowledge.

But what concerns me about the jury issue is that in this world that we live in, those of us who grew up in the State of Georgia and who have had some acquaintance with the habits of the various segments of our population, certainly know as a matter of common sense that people in different neighborhoods and of different races

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and different levels of society live in different ways. That's no criticism of any particular person or any particular race. It's a fact. This judge happened to grow up down in South Georgia in Albany when Albany was a little bitty place - it wasn't some 80,000 people, as it is now. So I played with Negro children, been in their homes, and have some familiarity with what goes on. When I first came to the Bar I remember I represented a Negro who was charged with murder and went down to the local bar to investigate it - talked to everybody in the bar. I well recall what goes on in Harlem on Saturday night. I've had many conversations with those who were employed by my mother and father about being in Harlem on Saturday night. I suggest to you that we also know, as a matter of common sense, that Harlem on Saturday night is not like being up on the white folks' side of town on Saturday night. Not that white folks don't cut up, don't drink liquor - do the same things to a degree that are done in Harlem; it's just that I suggest on Saturday night there is more liquor drunk and there is more that goes on down there. I remember an old, fine maid that we had who it was my job to take home when I was in high school. She cooked - and she liked to have a good time. She would come out of the kitchen and she would be "dolled up" and she would want me to take her and drop her in Harlem. I remember one time she said, "Lord, 'av Mercy, Mr. Owens, you ain't never lived till you've been a Nigger in Harlem on Saturday night."

I see the petitioner shaking his head. But again, that's not being critical of anybody, That's just a fact of life in the State of Georgia.

Now that's one of the reasons that the Court has noted the total absence of Negro faces on the jury. Twelve white jurors who have no appreciation for Harlem on Saturday night can't judge a case that involves an allegation that a Negro woman who has been arrested for being publicly drunk on eighteen occasions was raped by a man who she then let spend the night in her house on two occasions. And it is inconceivable that any good lawyer would expect twelve white jurors to even begin to understand that set of facts. That's the reason that this defendant and all defendants, I suggest to you, are entitled under the Constitution to have a jury that's made up of a cross section of the community. This illustrates it better than any case that I've run into in years. I'm not deciding that issue - I'm suggesting to you that's why it is important in this case more so than any other case that we have that issue develop.

From a constitutional standpoint there are two issues in this case on which the Court is in position to now pass judgment. The first issue is the question of whether or not this petitioner received the effective assistance of counsel that he is entitled to as discussed in many cases that y'all have referred to, including the case where a judge of this case

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was reversed on this very issue, Walker vs. Caldwell, 476 F. 2d 213. Of course y'all are familiar with that case. This case in effect says that we in the legal world always hesitate to say that one of our brethren in an appointed case has not done the good job that he should have done. Well, I know that. I don't welcome the opportunity to say that Mr. Matthews didn't effectively assist this petitioner. Mr. Matthews, as far as I know, enjoyed the finest reputation at the Bar. I don't think I knew him personally but I do know his partner, Bill Grant, who has appeared in this court before me, and I believe Mr. Matthews to be as good a lawyer as Bill Grant is and Bill Grant is a good lawyer.

But the fact that a man is a good lawyer doesn't mean that he effectively assisted a defendant in a criminal case in which he was appointed by the Judge of the Superior Court.

The Court notes that it's this Court's responsibility to make findings of fact on the issue of the effectivenss of counsel. And gentlemen, it is the conclusion of this Court judging this case that the late Mr. Matthews did not afford to this petitioner the effective assistance of counsel that the Constitution and laws command.

Why do I say that? Gentlemen, in the first place it is apparent from two of the three possible witnesses, the third witness, the husband of the victim, being deceased - the record will show the Court endeavored to have him here by subpoena and that was the report to the Court, that he is deceased - it is apparent from two of those three that Mr. Matthews didn't interview the witnesses before going into court. He did talk to the defendant. But he did not interview the witnesses for the purpose of being prepared to cross examine them. He could not go into their background for the purpose of indicating circumstances that might support the defendant's version without having even talked with them. The law does not prohibit anybody from talking with them. Of course even as shocking, but not constitutionally involved is the fact that the District Attorney didn't interview them either. Not only did he not interview the witnesses, he didn't subpoena any - from the record.

You gentlemen say that Georgia Mae's character can't be gone into -- well, if Mr. Matthews had talked with the defendant, the defendant could have been advised that he had a right in making an unsworn statement to tell not the few words that he said, but anything and everything. There was nothing to prohibit this defendant from having told of his life-long relationship with Georgia Mae, and from having told that Georgia Mae drank liquor, and from having gone into all the details in an unsworn statement, as far as this Court knows. I think the deciding cases would support it.

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There would have been nothing to prohibit Mr. Matthews from cross examining her on the issue of her habit of drinking liquor, which I suggest twelve jurors could find did have something to do with whether or not she consented to having sex relations with anybody. If twelve people can't take notice of the fact that liquor loosens the morals of all human beings, I suggest they are not qualified to sit in the jury box -- either that or they haven't had a drink of liquor, or they have been living alone all their lives. So the fact that she's been arrested eighteen times for being publicly drunk and she, by her own testimony admitted she could have been arrested on more occasions, could have been brought into this case.

That's not general character in the community - those are specific acts that go towards impeaching what this witness had to say.

He talked to eight police officers - Mr. Matthews did. The victim and her husband and her son, though he doesn't remember it, supposedly made statements to the police officers. After they testified their inconsistent statements could have been brought out for impeachment purposes by putting at least four police officers on the witness stand. No effort was made to impeach her on the grounds of inconsistent statement. And those inconsistent statements are shown in this transcript as is pointed out by Mr. Sizemore, is shown today. We've now got the knife and the pistol on the backward occasions when she appears in this courtroom today. Again, no effort to bring that out. He consented, Mr. Matthews did, to the warrant being brought into the case.

The matters set forth in a warrant, gentlemen, are not admissible in any court. No objection to that. Case law would clearly say you can't produce to a jury upon a criminal trial the facts set forth in an affidavit that somebody got to get a warrant for the arrest that preceded the indictment. That's rank hearsay. He didn't object to that.

He sat back while the Chief of Police went into the complete criminal record of this defendant, from the time he was a juvenile up until this trial - every arrest - not conviction - every circumstance of the arrest. Just things that the Constitution forbids - page after page. Of course the State says this Court shouldn't take notice of that. Gentlemen, I suggest that the error there is so plain that any court, be it the Superior Court of Tattnall County, or Elbert County, the Court of Appeals of Georgia or the Supreme Court of Georgia, should take notice of that as a matter of due process of law. And I suggest to you that it would be a denial of due process for this Court to now tell that petitioner who proceeded without the assistance of anybody on the two trips to the appellate courts that he's got to now go back and ask our appellate courts to take notice of plain error. More than anything, that indicates that Mr. Matthews was not representing this defendant. If he were, he would have never permitted that Police Chief to even take the stand - he would have objected to him being there. What's the purpose of a Police Chief being at a sentencing hearing? He's not the custodian

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or the records of any court. If you are going to introduce the records of convictions, gentlemen, you've got to bring a certified copy of the convictions into court. A police chief does not certify to anything. And what the Police Chief testified to is not even within the scope of what's permitted. It's just shocking that any lawyer would sit back and permit such testimony without making an objection.

Those are just some of the things that the Court notes, all of which as I say, leads to a conclusion as a finder of fact that this petitioner was deprived of his constitutional right to be effectively assisted by counsel.

Now the next thing, of course, gentlemen, in the Court's best judgment, the sentence that this defendant received is patently unconstitutional. It is unconstitutional to begin with because of the information that was before this jury when it considered its sentence, ninety-nine percent of which it was not entitled to have, under the decisions of the Supreme Court of the United States. If this Court based a sentence on that information it wouldn't last any longer than the mail could get down to New Orleans, if that long. It wouldn't last till a phone call could get to the Fifth Circuit.

And secondly, gentlemen, I want to suggest to you that there is one other ground. In Furman vs. Georgia, the Supreme Court of the United States held that the indiscriminate application of the death penalty is cruel and unusual punishment prohibited by the Constitution of the United States. In this Court's

best judgment, the indiscriminate application of the sentence of life imprisonment in a rape case such as this is the cruel and unusual punishment that is prohibited by the Supreme Court - in the Supreme Court's judgment by the Constitution of the United States. This record is void of any circumstances that would support two life sentences being imposed on any human being. It just smacks of a kangaroo court in this Court's best judgment.

Those, gentlemen, are the two main issues in this case as far as the Court sees them. There may also be the issue of the jury composition. If the jury was not attacked it should have been attacked and he did not waive his right to, then of course it would mean that the indictment itself also fails - not only his conviction but the indictment on which it was based. So the Court will reserve judgment on that.

But the Court has passed judgment, though incompletely in this case, to the extent that it has so stated, and however will not enter a complete judgment until such time as Mr. Shiver furnishes that information and you gentlemen advise whether or not you want to supplement the record in the case. But at that time you gentlemen may expect that the Court will supplement what it has said today for the purpose of granting upon terms that the Court will so state, the writ of habeas corpus, giving the State time to appeal the matter to the Fifth Circuit before the writ

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becomes final. Of course it would become final at the time they either say they are not going to appeal or their right to appeal is exhausted. Anyway, that will be taken care of at the time.

Until the case is concluded just let the petitioner remain in the custody of this Court in case we need his testimony further.

This 1st day of April, 1975.

/s/ Wilbur D. Owens, Jr.
Wilbur D. Owens, Jr.
United States District Judge

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

LUTHER HENRY ALLEN, *

Petitioner, *

v. * CIVIL ACTION NO. 74-39-Ath

JOSEPH HOPPER, Warden, *
Georgia State Prison,

*

Respondent.

FINAL ORDER GRANTING WRIT OF HABEAS CORPUS

On April 1, 1975, following the conclusion of an evidentiary hearing the court ruled from the bench as to all issues in this case except the possible constitutional attack upon the grand jury which indicted and the petit jury which tried the petitioner.

At the request of the court transmitted by John M. Shiver, Esquire, Attorney at Law of Elberton, Georgia, Mr. C. H. Rucker, Clerk of Elbert Superior Court, forwarded to the court a certified copy of

(1)the 1971 grand jury list from said Superior Court,
(2) the grand jury selected from said list which indicted petitioner,
(3) the 1971 petit jury list for said Superior Court, and

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(4) the list of the petit jurors selected from said list and from which a jury was selected for petitioner's trial.

The clerk added the racial identity of each person to the list at the court's request. An examination of that information shows that the grand jury list contains 250 names, of which 16 are those of persons of the Negro race. Negro citizens thus constitute approximately 3.019 percent of the names in the grand jury box. The petit jury list contains 1,727 names, of which 66 are those of persons of the Negro race. Negro citizens thus constitute approximately 3.822 percent of the petit jury list. The 1970 United States census shows that Elbert County, Georgia, had a total population of 17,272 persons, of whom 5,509 were persons of the Negro race. Negro citizens thus constitute 31.914 percent of the total population of the county.

It is undisputed that petitioner's court appointed counsel did not attempt to constitutionally challenge either the grand or petit jury of Elbert County. It is obvious had he endeavored to do so, such a challenge would have been successful. Whitus v. Georgia, 385 U.S. 545, 17 L. Ed 2d 599, 87 S. Ct. 643 (1967). This issue was not raised upon appeal in the state courts of Georgia and it would, therefore, be inappropriate for this court to grant a writ of habeas corpus on the basis of the obvious unconstitutional composition of said jury list. Petitioner if he desires to do so can raise these issues upon his retrial, if he is retried.

This additional information concerning the racial composition of the grand and petit jury list further convinces the court that its ruling as to the incompetency of petitioner's counsel is an appropriate disposition of this case.

For all of the reasons set forth in the court's ruling of April 1, 1975, and in this further ruling, the writ of habeas corpus must be granted.

IT IS THEREFORE ORDER, ADJUDGED and DECREED that Petitioner's conviction be set aside and that petitioner after this judgment becomes final as a result of the failure of defendant to lodge an appeal or as the result of the issuance of a mandate affirming this decision, whichever is later, be retried within 60 days, failing which this writ of habeas corpus without further order shall be made absolute and petitioner shall be released from custody.

SO ORDERED, this the 9th day of April, 1975.

/s/ Wilbur D. Owens, Jr.
Wilbur D. Owens, Jr.
United States District Judge

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

NO. 75-

JOE S. HOPPER, Warden,
Georgia State Prison,

Petitioner,

v.

LUTHER HENRY ALLEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CERTIFICATE OF SERVICE

I, B. Dean Grindle, Jr., Attorney of Record for the Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme

Court of the United States, I served three copies of the foregoing Petition for Writ of Certiorari upon the Respondent by depositing same in a United States mailbox, with first class postage prepaid, addressed to counsel of record as follows:

Mr. Lamar W. Sizemore, Jr.
Attorney at Law
P. O. Box 993
Macon, Georgia 31202

This 26th day of February, 1976.

B. DEAN GRINDLE, JR.

BLEED THROUGH